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No. 09-1412

In the Supreme Court of the United States

PARAGUAY HUMANITARIAN FOUNDATION, INC., F/K/A CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON, and JORGE RALPH GALLO QUINTERO,

Petitioners,

v.

BANCO CENTRAL DEL PARAGUAY, ON BEHALF AND AS ASSIGNEE OF BANCO UNION S.A.E.C.A. AND BANCO ORIENTAL S.A.I.F.E.C.A., BANCO UNION S.A.E.C.A., and BANCO ORIENTAL S.A.I.F.E.C.A.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

A. The Circuits Disagree Sharply on the Central Question in this Case 1

B. *Lucas* Does Not Grant District Courts Discretion To Dismiss under Rule 4(m) for Untimely Service in a Foreign Country 3

C. The District Courts Are In Conflict 5

D. The History of Rule 4(m) Does Not Support Imposition of a "Flexible Due Diligence" Standard 7

E. The Question Presented Affects a Large Class of Litigants 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) 7

Baja Devs. LLC v. TSD Loreto Partners,
No. CV-09-756-PHX-LOA, 2009 WL 2762050 (D. Ariz. Aug. 28, 2009) 3, 5

Duquesne Light Co. v. Westinghouse Elec. Corp.,
66 F.3d 604 (3d Cir. 1995) 4

Flock v. Scripto-Tokai Corp.,
No. Civ.A.H-00-3794, 2001 WL 34111630 (S.D. Tex. July 23, 2001) 4

G. Heileman Brewing Co. v. Joseph Oat Corp.,
871 F.2d 648 (7th Cir. 1989) (en banc) 4

Green v. Humphrey Elevator & Truck Co.,
816 F.2d 877 (3d Cir. 1987) 10

Henderson v. United States,
517 U.S. 654 (1996) 8

In re Copper Antitrust Litig.,
No. MDL 1301, 02-C-0707-C, 2003 WL 23200370 (W.D. Wis. May 30, 2003) 4

In re Southold Dev. Corp.,
148 B.R. 726 (E.D.N.Y. 1992) 6

Kim v. Frank Mohn A/S,
909 F. Supp. 474 (S.D. Tex. 1995) 4

Lucas v. Natoli,
936 F.2d 432 (9th Cir. 1991) 1, 2, 3, 5

Montalbano v. Easco Hand Tools, Inc.,
766 F.2d 737 (2d Cir. 1985) 1, 3

Nylok Corp. v. Fastener World Inc.,
396 F.3d 805 (7th Cir. 2005) 2

O'Rourke Bros. Inc. v. Nesbitt Burns, Inc.,
201 F.3d 948 (7th Cir. 2000) 5

Reed Elsevier, Inc. v. Muchnick,
130 S. Ct. 1237 (2010) 7

Umbenhauer v. Woog,
969 F.2d 25 (3d Cir. 1992) 3

United States ex rel. Drake v. Norden Sys., Inc.,
375 F.3d 248 (2d Cir. 2004) 6

STATUTES

96 Stat. 2527 (1983) 8

RULES

Fed. R. Civ. P. 4 7

Fed. R. Civ. P. 4(a) 8

Fed. R. Civ. P. 4(c)(1) 8

Fed. R. Civ. P. 4(j) 3

Fed. R. Civ. P. 4(m) ..... *passim*

Fed. R. Civ. P. 41(b) 4, 5, 6, 7, 8, 9

OTHER

146 F.R.D. 401 (1993) 8

REPLY BRIEF FOR PETITIONERS

A. The Circuits Disagree Sharply on the Central Question in this Case

Respondents seek to deflect attention from the significant inter-circuit conflicts identified by Petitioners by focusing on ancillary questions that merely point out the obvious. It is irrelevant to the petition that there may be "universal agreement" that the 120-day time limit in Rule 4(m) "does not apply to service in a foreign country." Opp. 3-4 (emphasis omitted). This purported "agreement" is simply a restatement of the plain language of Rule 4(m). It does not reflect any agreement on the separate and important issues presented by the petition relevant to the case at hand.

For instance, the courts of appeals are in clear disagreement over whether service in a foreign country must be attempted within 120 days for the foreign country exception in Rule 4(m) to apply in the first place. The Ninth Circuit in *Lucas v. Natoli*, 936 F.2d 432 (9th Cir. 1991), flatly rejected the "argu[ment] that service in a foreign country must at least be attempted within 120 days." *Id.* at 433. But the Second Circuit below applied its contrary rule that the foreign country exception does not apply "where a party d[oes] not attempt service within the 120-day limit . . . ." Pet. App. 7a (citing *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985)). The Seventh Circuit has also disagreed with the Ninth Circuit on this specific point, stating that dismissal for untimely service under Rule 4(m) may be proper if a plaintiff "ma[kes] no attempt to begin the process of foreign

service within 120 days." *Nylok Corp. v. Fastener World Inc.*, 396 F.3d 805, 807 (7th Cir. 2005).

Respondents attempt to paint the decision of the court of appeals as based not on "Petitioners' failure to attempt service within 120 days, but on their failure to do so in two and a half years . . . ." Opp. 5. But the fact remains that the court of appeals here refused to apply Rule 4(m)'s foreign country exception based on the timing of Petitioners' attempted service of the third-party complaint. In contrast, the Ninth Circuit would not have conditioned application of the foreign country exception on the timing of Petitioners' attempted service in a foreign country.

Respondents also tellingly fail to address the split in the courts of appeals over a district court's discretion to dismiss a complaint as untimely on Rule 4(m) grounds where service is in a foreign country. As discussed in the petition, *see* Pet. 11-12, both the Ninth and Seventh Circuits afford district courts no discretion to dismiss a complaint for failure to comply with the 120-day limit in Rule 4(m) when service is in a foreign country, *see Lucas*, 936 F.2d at 432-33 (no review for abuse of discretion); *Nylok*, 396 F.3d at 806-07 (same). But the Second and Third Circuits review a district court's dismissal for untimely service in a foreign country using the far more lenient abuse of

discretion standard.[1] *See* Pet. App. 7a; *Umbenhauer v. Woog*, 969 F.2d 25, 31-32 (3d Cir. 1992).

B. *Lucas* Does Not Grant District Courts Discretion To Dismiss under Rule 4(m) for Untimely Service in a Foreign Country

Respondents overly minimize the circuit conflict here by incorrectly interpreting the Ninth Circuit's decision in *Lucas* to afford district courts "discretion to dismiss if a plaintiff does not attempt to serve in a foreign country within some reasonable time beyond 120 days," Opp. 5, based on their reading of a solitary, unpublished district court case from that circuit. *See Baja Devs. LLC v. TSD Loreto Partners*, No. CV-09-756-PHX-LOA, 2009 WL 2762050 (D. Ariz. Aug. 28, 2009). But even the *Baja* district court did not find in *Lucas* authority to exercise the degree of discretion that Respondents propose. Rather, that court stated only that it had not found "any authority stating that a district court is precluded from setting a reasonable time limit for service in a foreign country to properly manage a civil case" – an entirely separate question. *Baja*, 2009 WL 2762050, at *1.

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[1] Respondents and the Ninth Circuit in *Lucas* correctly note that the Second Circuit's decision in *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985), did not purport to interpret Rule 4(j) – the predecessor to Rule 4(m) – at all. In that case, service was never attempted in a foreign country; rather, service was attempted only on the presumed domestic agent of a foreign corporation. *Id.* at 738, 740. But the Second Circuit below was clear that in its view and under its precedents, a district court has discretion to dismiss for untimely foreign service under Rule 4(m) and that the foreign country exception does not apply "where a party d[oes] not attempt service within the 120-day limit." Pet. App. 7a.

Respondents' interpretation conflates the questions whether a district court has discretion to dismiss for untimely foreign service under Rule 4(m) if a plaintiff fails to show due diligence and whether the district court may, under Rule 41(b) or pursuant to its inherent authority to manage cases, have discretion to set a reasonable time limit for service in a foreign country and subsequently enforce it. Several of the district courts that have recognized that the plain text of Rule 4(m) imposes no time limit for service in a foreign country have nonetheless concluded that they have the authority to set a reasonable time limit for foreign service. *See In re Copper Antitrust Litig.*, No. MDL 1301, 02-C-0707-C, 2003 WL 23200370, at *1 (W.D. Wis. May 30, 2003); *Flock v. Scripto-Tokai Corp.*, No. Civ.A.H-00-3794, 2001 WL 34111630, at *4-6 (S.D. Tex. July 23, 2001); *Kim v. Frank Mohn A/S*, 909 F. Supp. 474\, 479-80 (S.D. Tex. 1995).

Petitioners do not argue that a district court is precluded from setting a reasonable time limit for service in a foreign country pursuant to its inherent authority to manage its cases – as opposed to Rule 4(m). *See, e.g., Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 609 (3d Cir. 1995) ("Although the procedural rules governing federal civil litigation do not explicitly authorize a district court to set time limits for a trial, a district court has inherent power to control cases before it, provided it exercises the power in a manner that is in harmony with the Federal Rules of Civil Procedure." (internal quotation marks omitted) (quoting *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (en banc))). But a district court's authority to impose – and enforce – a reasonable time limit to manage its docket does not include the authority to dismiss a complaint for

untimely service *where no time limit is in effect*. Rule 4(m) clearly exempts service in a foreign country from the 120-day limit applicable to domestic service, and the Rules otherwise impose no diligence requirement specific to service in a foreign country. A district court therefore lacks discretion to dismiss a complaint for untimely foreign service under Rule 4(m) unless it is enforcing a reasonable time limit it has previously imposed or unless it exercises its authority under Rule 41(b) to dismiss for failure to prosecute.

The fact that the district court in *Baja* concluded that *Lucas* was consistent with its authority to impose a reasonable time limit for foreign service does not support the proposition that *Lucas* would allow a district court's dismissal for untimely service in a foreign country based on Rule 4(m) alone, as occurred here. *Cf. O'Rourke Bros. Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948, 952 (7th Cir. 2000) ("Because the current rule, Rule 4(m), is silent as to sanctions for not serving foreign defendants, perhaps Rule 41(b) . . . is precisely the proper [basis for a dismissal].").

C. The District Courts Are In Conflict

Respondents assert that "[t]en of the eleven district court cases" cited by Petitioners (at Pet. 15 n.8) do not support Petitioners' contention that those courts followed the Ninth Circuit's view that Rule 4(m) imposes no time limit for foreign service and that such foreign service is not subject to a "flexible due diligence" requirement. Opp. 5. In fact, all of those cases support just such a proposition.

All eleven cases agree with the Ninth Circuit that Rule 4(m) imposes no time limit for foreign service,

and *none* imposes a requirement that a plaintiff show "due diligence" or "reasonableness" to avoid dismissal under Rule 4(m).[2] These district court cases all conflict with the numerous district court cases, also cited by Petitioners, that do require a plaintiff to show due diligence or that the time to effect service is reasonable to avoid dismissal. *See* Pet. 13-14 nn.6 & 7.

Moreover, Respondents fail to address the clear conflict in the district courts over whether service in a foreign country must be attempted within 120 days for the foreign country exception to apply. *See* Pet. 15-16 nn.9 & 10.

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[2] *In re Southold Dev. Corp.*, 148 B.R. 726 (E.D.N.Y. 1992), applies a "flexible due diligence" standard under Rule 41(b), not Rule 4(m). *Id.* at 730 (citing Rule 41(b) as the source of a district court's authority to dismiss for failure to effect service in a foreign country). But the district court below did not purport to exercise its discretion to dismiss for failure to prosecute under Rule 41(b), and the court of appeals did not affirm on that ground. In the Second Circuit, the court of appeals would have reviewed a dismissal under Rule 41(b) for whether

> (1) the plaintiff's failure to prosecute caused a delay of significant duration; (2) plaintiff was given notice that further delay would result in dismissal; (3) defendant was likely to be prejudiced by further delay; (4) the need to alleviate court calendar congestion was carefully balanced against plaintiff's right to an opportunity for a day in court; and (5) the trial court adequately assessed the efficacy of lesser sanctions.

United States ex rel. Drake v. Norden Sys., Inc., 375 F.3d 248, 254 (2d Cir. 2004). Neither the district court nor the court of appeals considered the factors relevant to dismissal under Rule 41(b) in this case. And indeed, it is unlikely that proper application of those factors to Petitioners here would have justified dismissal pursuant to this rule.

D. The History of Rule 4(m) Does Not Support Imposition of a "Flexible Due Diligence" Standard

Respondents argue that the flexible due diligence standard adopted by the district court below[3] is available under Rule 4(m), despite the absence of any reference to such a standard in the Rule, because courts purportedly applied that standard when the Rule contained no express time limit prior to the 1983 amendments. *See* Opp. 6. But the history of the Rule does not support Respondents' position.

Rule 4 was amended in 1983 to shift responsibility for service from United States marshals to plaintiffs. *See* Fed. R. Civ. P. 4 advisory committee's note (1993) ("The 1983 revision of Rule 4 relieved the marshals' offices of much of the burden of serving the summons."). According to this Court, prior to 1983, "[m]arshals were expected to effect service expeditiously, and Rule 41(b), providing for dismissal '[f]or failure of the plaintiff to prosecute,' could be

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[3] Only some district courts share this view. Respondents' contention that "district courts virtually universally acknowledge discretion to dismiss . . . and . . . employ a single standard that considers the totality of the circumstances," Opp. 6, is belied by the many cases cited by Petitioners that employ different standards, *see* Pet. 14-15 nn.7-8. Moreover, the cursory citation by a number of district courts to prior district court decisions in support of such a standard is akin to the "drive-by jurisdictional rulings" this Court has stated should receive "no precedential effect." *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (internal quotation marks omitted); *see also Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1251 (2010) (Ginsburg, J., concurring) (dismissing as "drive-by jurisdictional rulings" "well over 200 opinions" characterizing a statute as jurisdictional).

invoked as a check against unreasonable delay." *Henderson v. United States*, 517 U.S. 654, 662 (1996) (quoting Fed. R. Civ. P. 41(b)). Thus, prior to the adoption of the 120-day time limit, dismissal for "unreasonable delay" in service was proper only under Rule 41(b).

Under the 1983 amendments to Rule 4, however, plaintiffs became "responsible for *prompt* service of the summons and a copy of the complaint." Fed. R. Civ. P. 4(a), 96 Stat. 2527 (1983) (superseded 1993) (emphasis added). The subsequent 1993 amendments to the Rule removed the requirement that a plaintiff effect "prompt" service and instead imposed the requirement in effect under the Rule today – that a plaintiff serve the complaint "within the time allowed under subdivision (m)." Fed. R. Civ. P. 4(c)(1); *see* Fed. R. Civ. P. 4(c)(1), 146 F.R.D. 401 (1993).

Thus, Rule 4 today not only expressly relieves plaintiffs from any time limit for foreign service, but it also no longer contains a requirement that a plaintiff "prompt[ly]" serve the complaint; rather, a plaintiff is only required to serve a complaint within the time limit provided by subdivision (m). Where service is in a foreign country "the time allowed under subdivision (m)" is unlimited, though Rule 41(b) may remain "a check against unreasonable delay" as it did prior to 1983. *See Henderson*, 517 U.S. at 662. As the district court below did not purport to exercise its authority under Rule 41(b), however, the district court's decision here cannot be upheld on that ground. *See* Pet. 20.

E. The Question Presented Affects a Large Class of Litigants

Respondents' contention that the question presented by the petition affects only "a tiny fraction of cases" in which parties lack diligence, *see* Opp. 7, ignores the impact the question has on a far larger group of litigants.

Foreign litigants increasingly will find themselves sued in federal courts and are entitled to clarity as to whether there is a time limit for attempted service in a foreign country, whether a plaintiff must act diligently in effecting service in a foreign country, and whether a district court has discretion to dismiss under Rule 4(m) for untimely service in a foreign country or whether the defendant must request that the district court impose a reasonable deadline or dismiss pursuant to Rule 41(b). These procedural rules should not depend on the judicial circuit in which a plaintiff initiates a lawsuit.

Additionally, if, as Petitioners argue, district courts do not have discretion under Rule 4(m) to dismiss a complaint for untimely foreign service, then untold numbers of plaintiffs have been and – absent intervention by this Court – will be unnecessarily inconvenienced and prejudiced by having to re-file complaints, forcing them to pay multiple filing fees and wasting judicial resources. Any plaintiff who files a complaint near the expiration of the statute of limitations may be subject to a dismissal that, while technically without prejudice, may end the plaintiff's ability to sue as a practical matter. These outcomes nullify what the rulemakers hoped to achieve by relieving plaintiffs of the 120-day time limit in Rule

4(m). *See Green v. Humphrey Elevator & Truck Co.*, 816 F.2d 877, 881 (3d Cir. 1987) ("[T]he vagaries of [foreign] service render the [120-day] time limit too burdensome on a plaintiff.").

As discussed in the petition, this case presents an ideal and rare opportunity for this Court to provide much-needed guidance on this basic question of federal civil procedure, and this Court should take it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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